STATEMENT OF THE CASE.

The Appellant, Kentucky Rural Electric Cooperative Corporation, of Louisville, Kentucky, hereinafter called "KYRECC" is a corporation organized under Chapter 279 of the Kentucky Revised Statutes, the same being the Kentucky REA Enabling Act. This Act contemplates organization of rural electric cooperatives for the purpose of distribution and sale of electric energy to individuals. It also contemplates organization of cooperatives, whose members are other cooperatives, for the purposes of furnishing certain services to and procuring electrical equipment and supplies for the cooperative members.

The Appellee, Moloney Electric Company, hereinafter called "MOLONEY" is a manufacturer of electrical equipment and supplies whose official place of business is St. Louis, Missouri. (See Page 3a of the certified record filed herein. Similar parenthetical references hereinafter given are references to pages in the certified record.)

KYRECC was organized in 1943 to perform certain services provided for in the Kentucky REA Enabling Act, its members being some twenty-odd rural electric power distributors in Kentucky. In 1948 it began to act as distributor of electrical materials and equipment, selling primarily to its member cooperatives. (16a, 125a). In April of 1949, KYRECC and MOLONEY began business under an agreement whereby MOLONEY established KYRECC as its distributor to handle electric transformers, KYRECC selling these

transformers to rural electric distributors of electric power in Kentucky (3a, 4a) who were member cooperatives of KYRECC (125a).

KYRECC was approved as a distributor of MOLONEY transformers by the Rural Electrification Administration, and KYRECC in negotiating sales of MOLONEY transformers to its members did so in open competition and in competitive bidding with other manufacturers, suppliers and distributors as required by REA. (137a and 138a). Sometimes KYRECC would win the bidding for sales to its member cooperatives, and at other times it lost to other suppliers. (28a).

Among the services performed by KYRECC as a distributor of MOLONEY transformers were warehousing, shipping, insuring, repairing, performing promotional activities in connection with the sale of transformers, putting traveling salesmen on the road both separately and together with other MOLONEY salesmen, and assisting MOLONEY in the collection of accounts against KYRECC members (139a).

For these services KYRECC received from MOLONEY a normal distributor's commission which varied from 7½ to 10 per cent. (4a). Though it never paid any of these commissions to its members as patronage dividends, it did establish in its accounting records certain credits for the ultimate benefit of its patrons in proportion to the amount of purchases each patron made. (30a and 138a). The gross commissions paid by MOLONEY to KYRECC over the period of the contract amounted to approximately $367,000.00 and

the damages demanded in the complaint as amended were based upon the expectation of continuation of such commissions for a "reasonable time" had the contract not been broken. (81a).

Prior to October of 1955 KYRECC representatives had been warned by MOLONEY that MOLONEY was considering dropping KYRECC as a distributor of its transformers because of pressure from the private power companies. Then, on October 3, 1955, Mr. Milner Gray, a MOLONEY representative, appeared in Louisville before the board of directors of KYRECC to announce MOLONEY'S decision to cut off the supply of transformers to KYRECC. (8a, 9a). This, he said, was because of pressure from Moloney's larger customers, the power companies. (10a-12a).

After Gray's announcement, the relationship continued only for a brief period and amounted only to winding up the sale of transformers KYRECC still had on hand and allowing KYRECC to purchase spare parts for repair of the MOLONEY transformers previously sold. (9a). After being cut off as a distributor by MOLONEY, KYRECC made a number of attempts but was unable to negotiate any similar arrangement with any other manufacturer of desirable equipment and was, as a matter of fact, put out of business as a distributor of transformers (82a, 83a). KYRECC then initiated this triple damage action alleging MOLONEY discriminated against it as a distributor and destroyed its business in a manner prohibited by § 2(a) of the Clayton Act as amended by § 1(a) of the Robinson-Patman Price Discrimination Act, 38 Stat. 730

(1914) as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (1952).

At the time of the termination of the relationship there was no suggestion made by MOLONEY that the reason for its elimination of KYRECC was because of any illegality in the relationship between the two. In its first answer MOLONEY made no claim that the arrangement between the two was in anywise illegal under § 2(c) of the Clayton Act as amended by the Robinson-Patman Act. (See the original answer filed by MOLONEY, 13a, 14a).

After the filing of MOLONEY'S answer, KYRECC amended its complaint for the sole purpose of reducing the amount of damages claimed (89a). Thereafter in answer to the complaint as amended, for the first time MOLONEY alleged as a defense that the relationship was a violation of § 2(c) of the Clayton Act as amended by the Robinson-Patman Act (91a), and since the filing of that pleading has continued to urge that as the reason for its termination of business with KYRECC.

The District Court for the Western District of Kentucky entered summary judgment for MOLONEY, on the grounds that the paying or granting by MOLONEY to KYRECC and the receiving or accepting by KYRECC from MOLONEY of any commission upon the purchase by the member cooperatives of KYRECC of transformers and other equipment manufactured by MOLONEY was unlawful by reason of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, and that the agreement between MOLONEY

and KYRECC for the payment of such commission was illegal, unenforceable and void.

This judgment was affirmed by the Court of Appeals for the Sixth Circuit.

REASON FOR GRANTING THE WRIT.

The Court of Appeals for the Sixth Circuit Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

There may be many ways to interpret the decisions of the District Court and the Court of Appeals for the Sixth Circuit herein but uninterpreted they forbid the acquisition of any operating margin by any cooperative doing business in interstate commerce. Cooperatives survive by trading between their members on the one hand and the public in general on the other. Usually after a contribution by the members of a small amount of beginning capital, a cooperative continues in existence by using the margin of difference between the price which it pays for a product—in the case of a cooperative such as the one herein—and the price it sells that product for to its members. If on the other hand the cooperative is a selling or marketing cooperative such as the citrus growers cooperatives of the south, it accumulates margin from the difference paid by the purchasers of the processed product it sells and the amount it turns over to its members, the growers or producers. So whether a cooperative be purchasing for members or selling members' products on the public market, it obtains margin, usually small,

sometimes called a profit by those who oppose cooperatives. If the reasoning of the Court of Appeals for the Sixth Circuit is correct, all such transactions in interstate commerce are violations of 2(c) of the Clayton Act, because they constitute a buyer paying a seller's agent or vice versa. We do not believe this a proper application of the Act either from its obvious intention or from the literal carrying out of its specific language. We believe this is an important question of federal law which has not been but should be decided by this court.

In the beginning it may be well for us to say that we agree with a number of the cases that are cited in the opinion of the Sixth Circuit decision. We feel that the cooperative method of doing business is basically legitimate. We think cooperatives should be allowed to engage in business in the same fields as other corporations and that in so doing they should sustain the same responsibilities and receive the same protection of the law.

The Sixth Circuit Court opinion cites Maryland & Virginia Milk Producers Association, Inc. v. United States, 362 US 458, 4 L ed 2d 880, 80 S Ct 847 (1960). Here this court sustained an action brought by the United States charging a milk cooperative with monopoly. There was little doubt about the existence of the offense and the court held that the monopolizing cooperative could not insulate itself from its action by protection of § 6 of the Clayton Act (38 Stat. 731 (1914) as amended, 15 U. S. C. § 17) nor by §§ 1 and 2 of the

Capper-Volstead Act (42 Stat. 388 (1922), 7 U. S. C. § 291). The court in so holding says of these acts:

> "We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." 362 US at—, 4 L ed at 887, 80 S Ct at—.

Though the defenses the milk producers cooperative sought to raise are not the same points of law in issue here, the same principle applies, for we are urging, in the spirit of the court as expressed by Mr. Justice Black in the cited case, that KYRECC be given the same burden of responsibility and the same competitive advantage as any other kind of corporation.

We agree that a cooperative has no more right to restrain trade than any other corporation. In addition to that, we also say that where a cooperative is not a true cooperative performing the proper function of a cooperative but is merely using the guise as a device for evading the law, or to gain economic power for illicit purposes, it is not entitled to the protection the law normally provides for cooperatives. Here we would note that in the case of Quality Bakers of America v. F.T.C., 114 F. 2d 393 (1st Cir. 1940), cited in the opinion of the Sixth Circuit in the case at bar, the Federal Trade Commission found the "cooperative" there involved was a fake designed for the purpose of

evading the law. The court said that the Quality Bakers Association ". . . is not a cooperative association within the meaning of section 4 of the Robinson-Patman Act, 15 U.S.C.A. § 13(b) . . ." 114 F. 2d at 397. On that basis we agree with the Quality Bakers case and with the frequent holdings that the privilege normally extended to cooperatives shall not be afforded cooperative schemes which are mere bookkeeping arrangements designed to evade the law. See Modern Marketing Service, Inc. v. F.T.C., 149 F. 2d 970 (7th Cir. 1945); Independent Grocers A. D. Co. v. F. T. C., 203 F. 2d 941 (7th Cir. 1953).

Very recently this court denied certiorari in a case where a group of buyers combined to obtain improper competitive advantage and the F.T.C. ordered them to cease and desist. The first corporation through which the combination operated was not a cooperative. A successor corporation purported to be a cooperative. American Motor Specialties Co., Inc. v. F.T.C., 278 F. 2d 225 (2d Cir. 1960), certiorari denied, 29 U.S.L. Week 3135 (U.S. Nov. 7, 1960.) This was a plain case of large buyers combining to get unfair advantage where Circuit Judge Waterman said:

> "Absent a cost justification for volume discounts, or a competitive situation not of the seller's own making, or other exceptions to the basic theory of the Section, a seller under Section 2(a) of the amended Clayton Act, 15 U.S.C.A. § 13(a) may not charge discriminating prices based upon the volume of the buyer's purchases." 278 F. 2d at 226.

In discussion of the effect of Section 4 of the Robinson-Patman Act, a point which will again be touched upon in later pages of this petition, the court says:

> "Fourth, petitioners contend that because the successor corporate buying group, Metropolitan Automotive Wholesalers Cooperative, Inc., was organized under the Cooperative Corporations Law of the State of New York, it was entitled to the protection of Section 4 of the Robinson-Patman Act, 15 U.S.C.A. § 13b. Quality Bakers of America v. F.T.C., 1 Cir., 1940, 114 F. 2d 393, 400, holds that Section 4 does not authorize cooperatives to accept brokerage fees forbidden by Section 2(c) even though these fees are passed on to the members. Section 4 states that nothing in the Robinson-Patman Act shall prevent a cooperative association from returning to its members, producers, or consumers any part of the association's earnings. Section 4 does not confer upon cooperative associations any blanket exemption from the Robinson-Patman Act. It only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings. See Farmers Cooperative Co. v. Birmingham, D.C.N.D. Iowa 1949, 86 F. Supp. 201, 230. The fact that earnings which result from illegal activity may be distributed to the association's members does not insulate the association from prosecution for the illegal activity. Clearly Section 4 does not permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members. Neither can Section 4 be said to prohibit imputing to the cooperative knowledge

possessed by its membership for purposes of establishing knowing receipt under Section 2(f). 278 F. 2d at 229.

Thus it appears to us the American Motor Specialties case turns on the proper point that the purported "cooperative" there received margins by obtaining a discriminatory price without any cost saving justification. We agree with this opinion.

In relation to the cases where activities are carried on improperly under the guise of a cooperative, we wish to note here that KYRECC was not organized to create monopoly, to restrain trade or to injure competition. It was organized under a specific enabling act of the Commonwealth of Kentucky which anticipated that the Rural Electric cooperatives of Kentucky would be small, thinly financed organizations and would find difficulty in purchasing materials on a basis reasonably equal to that of the private power companies. KYRECC within the purposes enumerated in the law performs many other functions than that simply of a distributor of MOLONEY transformers and as a distributor of electrical equipment. It publishes a magazine, it conducts a safety and job training program for its member cooperatives, does printing and central billing and performs various other services.

Moreover, KYRECC was not organized as an afterthought plan to evade antitrust law. It was in business for a number of years prior to becoming a distributor for MOLONEY. Its presence in the field brought one more bidder to the table and thus increased competi-

tion, and its demise as a distributor of transformers has reduced competition by one. There can be no comparison of the activities here to the activities of the so-called cooperatives in the above cited cases.

Here we invite this Court's attention to some comments in the opinion of the Court of Appeals such as that KYRECC ". . . is not an operating rural electric co-operative and does not generate, transmit or distribute electric energy. It is a so-called 'super co-operative' owned and controlled by twenty-two operating co-operatives." 282 F. 2d at 482. Certainly KYRECC considers itself to be an operating cooperative. This language of the Circuit Court was adopted from the brief for MOLONEY in the District Court, and reiterated by the Circuit Judge. KYRECC is only a "super co-operative" in the eyes of those who have succeeded in eliminating it as a distributor of transformers. This fact well demonstrates its inferiority in economic power to the forces aligned against it, the private power companies and Moloney Electric Company, which, acting in concert, removed it from the field of competition.

We urge this court to grant certiorari and in support of this position say that the language of § 2(c) of the Clayton Act that one party to a transaction cannot pay commission to the other party or the other party's agent "except for services rendered" needs re-evaluation by this Court. We further say that Section 4 of the Robinson-Patman Act was intended to provide protection for the exact situation as confronts us at bar.

Briefly we shall discuss these thoughts in the order stated.

As recently as June 1960, in the case of Federal Trade Commission v. Henry Broch and Company, 362 US 992, 4 L ed 2d 1124, 80 S Ct 1074, this court in a split decision noted that the decisions which have hitherto disallowed the "services rendered" language as a basis for justifying commissions have been criticized. Mr. Justice Douglas delivered the opinion of the court. In so doing and in reference to the case of Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 106 F. 2d 667 (3rd Cir. 1939), he said:

> "Although that court's interpretation of the 'services rendered' exception in § 2(c) has been criticized, its conclusion that the price reduction was an allowance in lieu of brokerage within the meaning of § 2(c) has been followed and accepted.
>
> "We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. *We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances.* One thing is clear—the absence of such evidence and the absence of a claim that the rendition of

services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated." 362 US at—, 4 L ed 2d at 1130, 80 S Ct at—(Emphasis added).

In the case at bar KYRECC performed all the normal functions of a distributor. It warehoused, shipped, insured, put salesmen on the road, assisted MOLONEY in the collection of delinquent accounts against its own members. All of these were valuable services and effectuated the normal saving that a manufacturer experiences who does not act as his own distributor. Surely when the statute says that these commissions cannot be paid "except for services rendered" if this language is to have meaning at all it must have application to the facts here at hand. We think the emphasized language of the above cited case does so imply.

Further we say that it was the clear intention of Section 2 of the Clayton Act as amended by Section 4 of the Robinson-Patman Price Discrimination Act, 49 Stat. 1528 (1936), 15 U.S.C. § 13(b), to permit a cooperative to engage in business the way appellant did here. This section states that nothing in the Robinson-Patman Act prevents cooperatives from returning to members ". . . net earnings or surplus resulting from . . . trading operations, in proportion to their purchases or sales from, to, or through the association." Here we submit that the Court of Appeals misunderstands the basic consequences of its decision as indicated in the following language:

"We agree that it was the purpose of Section 4 to protect cooperatives in their competition with

corporate competitors. But this protection was specifically limited to the provision that a co-operative would not be in violation of the Act merely because of its structure as a co-operative with the distribution of its co-operative earnings among its members on a patronage basis. Under Section 4 such a distribution does not in and of itself constitute a violation of the Act, even though the act of returning profits to its members might technically be considered as constituting a discriminatory rebate or price discrimination in favor of its member purchasers and against its non-member purchasers. But that is as far as the exemption goes. If Congress intended to exempt co-operatives from the various anti-trust and price discrimination provisions of the Act, it could easily have said so. It did not do so. Section 4 deals only with the single act of a co-operative returning its profits to its members. *It does not exempt a co-operative in the acquisition of such profits in its business operations before they are distributed.*" 282 F. 2d at 485 (Emphasis added).

The Court of Appeals in effect is saying a cooperative is free to distribute margin in any way it wishes but it is not free to acquire that margin in the first place. If a cooperative may not acquire margin it certainly can distribute none. If it cannot acquire margin it cannot exist. Here we urge the test should be whether in the acquisition of its margin it tends to restrain trade, lessen competition or create monopoly. If the answer to this question is yes—as was the case in the American Motor Specialties case, the Quality Bakers case, the Maryland and Virginia Milk Pro-

ducers case and others—then the fact that it is a cooperative will not protect it.

But if its existence and operation increases competition and trade, and if it performs valuable services for the party paying the commission, as the facts at bar show, then the mere fact that it is a cooperative will not cause it to conflict with § 2(c).

The committee hearings and congressional reports available from the time of passage of the act throw considerable light upon the reasons for the existence of Section 4 and its provisions of exemption to cooperatives from Robinson-Patman Act requirements. In one of these hearings the following thoughts are expressed:

> "Section (f) [enacted as Section 4 of the 1936 Act] affirms the right of cooperatives to distribute their net earnings resulting from their trading operations among their members on a patronage basis in proportion to their purchases or sales from, to, or through such cooperative association. While the bill contains elsewhere no provision either express or implied to the contrary, *this section is added as a precautionary reservation in a spirit of encouragement to the cooperative movement.*" House Committee Report No. 2287, March 31, 1936, CCH Trade Regulation Reporter ¶ 3575.25. (Emphasis added.)

Another report states:

> "Whether functioning as buyers or sellers, cooperatives also share under the bill the guaranties of equal treatment and equal opportunity which it seeks to accord to trade and commerce generally."

Statement of Managers on part of House, Report No. 2951, June 8, 1936. CCH Trade Regulation Reporter ¶ 3575.26.

Further, 80 Congressional Record 9419, June 15, 1936 concerning H. R. 8442, CCH Trade Regulation Reports ¶ 3575.27, quotes Mr. Utterback of the House of Representatives as follows:

> "Section 4 represents another provision added to the bill in the fullness of caution to protect the distribution of cooperative earnings or surplus among their members on a patronage basis. In the dealings of cooperatives with others they share, of course, the protections and guaranties of the bill as to equal treatment and equal opportunity which it extends to producers, manufacturers, and merchants in trade and commerce generally. It leaves the members of cooperatives free to seek through cooperative endeavor the economies and savings of mass operations and assures to them, as compared with their larger corporate competitors, any real economies and savings to which those mass operations entitle them, and which they often now do not receive. There is nothing in the last section of the bill that distinguishes cooperatives, either favorably or unfavorably, from other agencies in the streams of production and trade, so far as concerns their dealings with others." CCH Trade Regulation Reporter ¶ 3575.27.

At another point the House Committee Report No. 2287, March 31, 1936 states:

> "There is nothing in [this bill] to penalize, shackle, or discourage efficiency, or to reward in-

efficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions.

"Any physical economies that are to be found in mass buying and distribution whether by corporate chain, voluntary chain, mail-order house, department store, *or by the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—none of them are in the remotest degree disturbed by this bill.*" House Committee Report Number 2287, Mar. 31, 1936. CCH Trade Regulation Reporter ¶ 3505.100. (Emphasis added.)

CONCLUSION.

The decision of the Court of Appeals herein if allowed to stand enables those who wish to restrict competition to eliminate cooperatives as effective competitors in interstate commerce. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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